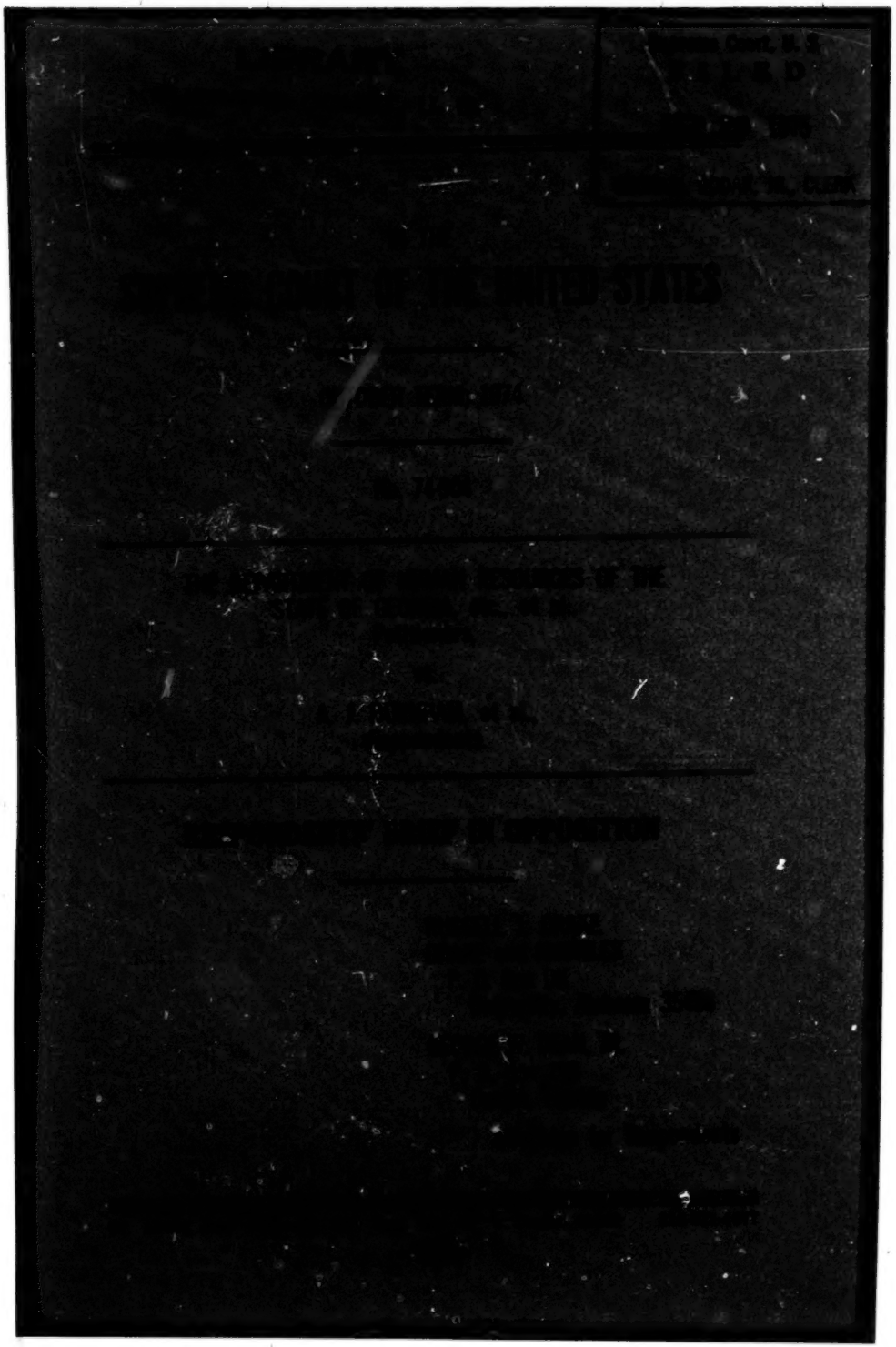

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case and Proceeding in the Courts Below 3

Reasons Why Writ Should Be Denied 4

I. There is no suggestion and indeed no indication, that the prerequisites of Rule 19 are satisfied by this case 4

A. Decisions by other courts—no conflict among the circuits 4

B. The substantial or important federal question .. 8

II. The court of appeals was correct in reversing the district court in light of the court of appeals decision in Donaldson v. O'Connor and Wyatt v. Aderholt 12

Conclusion 16

Table of Cases

Burnham v. The Department of Public Health of the State of Georgia, 349 F.Supp. 1335 (N.D. Ga. 1972) 1, 6, 11, 12, 14, 16

Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) 6

Davy v. Sullivan, 354 F.Supp. 1320 (M.D. Ala. 1973) .. 5

Davis v. Watkins, No. C73205 slip op. at 12 (N.D. Ohio, Sept. 1974) 5

Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1972) cert. granted, — U.S. —, 42 L.Ed.2d 138 (October 21, 1974) 2, 3, 4, 5, 7, 8, 11, 12, 13, 14, 15

Humphrey v. Cady, 405 U.S. 504 (1972) 13

In Re Ballay, 482 F.2d 648 (D.C. Cir. 1973) 5

Jackson v. Indiana, 406 U.S. 715 (1972) 8, 13

Kesselbrenner v. Anonymous, 33 N.Y. 2d 161, 305 N.E. 2d 903 (1973) 5, 7

Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) 6

Martarella v. Kelly, 349 F.Supp. 575 (S.D. N.Y. 1972), enforced 359 F.Supp. 478 (S.D. N.Y. 1973) 5

Nason v. Supt., Bridgewater Hosp., 353 Mass. 604, 233 N.E. 2d 908 (1968) 13

Nelson v. Heyne, 355 F.Supp. 451 (N.D. Ind. 1972), aff'd 491 F.2d 352 (7th Cir. 1974), cert. denied — U.S. — (1974) 5

New York State Association for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973) 6, 7

People of New York ex rel. Anonymous v. LaBurt, 218 N.Y.S. 738 (1961), cert. denied 369 U.S. 428 (1962) .. 6, 7

Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967) 6

Walsh v. Likins, 373 F.Supp. 487 (D. Minn. 1974) 5

Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971) and 344 F. Supp. 387, 390 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 12

United States v. Soloman, civ. act. No. 74-181 (D. Md. filed Feb. 21, 1974) 7

United States v. Walker, 335 F.Supp. 705 (N.D. Cal. 1971) 5

Texts Cited

American Psychiatric Association Task Force on the Right to Treatment, Draft Position Paper on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded (4th Draft, Oct. 1974) 7

Birnbaum, "The Right to Treatment," 46 A.B.A.J. 499 (1960) 7

Comment, "Development in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. 1190 (1974) 7

Drake, "Enforcing the Right to Treatment," 10 Am. Crim. L. Rev. 587 (1972) 7

"Position Statement on the Question of Adequacy of Treatment," 123 Am. Journ. Psychiatry, 1458 (1967) 7

Robitscher, "Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient," 18 Vill. L. Rev. 11 (1972) 7

Szasz, The Manufacture of Madness (Harper & Row 1970) 10

"The Nascent Right to Treatment," 53 Va. L. Rev. 1134 (1967) 7

Tribe, "Foreword—Toward a Model of Roles in Due Process of Life and Law," 86 Harv. L. Rev. 1, 17 (1973) 13

Statutes and Rules Cited

28 U.S.C. § 1343 3

42 U.S.C. § 1983 .....3, 12

Ga. Code Ann. § 88-502.3(a) 11

Supreme Court Rules (1970), Rule 19 ..... 2, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-904

THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, etc., et al.,
Petitioners,

vs.

A. J. BURNHAM, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Plaintiffs-Respondents A. J. Burnham *et al.*, by their attorneys, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335

(N.D. Ga. 1972) (henceforth "the district court opinion"). The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (henceforth the "Court of Appeals decision") is reported at 503 F.2d 1319 (5th Cir. 1974) and is attached as a part of the Appendix to Petitioner's petition for certiorari (henceforth cited as Pet. App.). Also included in Pet. App. is the opinion of the Fifth Circuit in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 18A) was entered on November 8, 1974. Petitioners' petition was filed, and the case was docketed, in this Court on January 22, 1975. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The district court opinion (Pet. App. 1A), relying solely on the pleadings, granted Defendants-Petitioners' motion to dismiss prior to any evidentiary hearing. The absence of any record raises the question of whether this Court should attempt to resolve complex constitutional issues without any factual background against which to formulate the dimensions of the "right to treatment," and without any indication that the prerequisites of Rule 19 have been satisfied.

2. The instant case was consolidated in the Court of Appeals with *Wyatt v. Aderholt* (Pet. App. 19a); to some extent the Circuit Court's *per curiam* decision below was arrived at in light of the voluminous record before that court in *Wyatt*. Additionally this Court has granted certiorari in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1972) *cert. granted*, — U.S. —, 42 L.Ed.2d 138 (October 21, 1974); *argument reported* 43 U.S.L.W. 3397. Accordingly the question is presented of

whether the Court of Appeals decision should be affirmed or whether alternatively the requested writ of certiorari should be denied in that: (A) the Circuit Court's decision was correct and (B) this Court will answer the question sought to be reviewed herein in the *Donaldson* case.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW

Petitioners' petition for certiorari argues their case and fails to report succinctly the progression of the case to this Court.

On March 29, 1972 Plaintiffs-Respondents filed this class action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 in the United States District Court for the Northern District of Georgia. The complaint was brought on behalf of the patients confined to Georgia's various mental health hospitals; it alleged that each named institution "is providing constitutionally inadequate diagnosis, care and treatment of the patients confined there." (A 7):[1] Each institution was charged with the following deficiencies: "(1) The failure to provide a humane psychological and physical environment; (2) Failure to provide a qualified staff in numbers sufficient to administer adequate treatment; and (3) Failure to provide individualized treatment plans for each patient." (A 7). The complaint further noted that in "a large number of cases" the care and treatment provided amounted only to "custodial care." (A 7).

In the prayer for relief Plaintiffs-Appellants requested the district court to declare that the patients confined to the specified institutions "are constitutionally entitled" to adequate treatment. (A 8).

---

[1] The record printed as the Appendix has not been filed in this Court. For purposes of citations to the record Respondents will refer to the printed Appendix before the Court of Appeals as "A", followed by the applicable page number.

On April 21, 1972 the Defendants filed a pleading entitled "Defenses and Answer" which served both as a motion to dismiss and an answer.

On August 3, 1972, prior to an evidentiary hearing, the district court entered its order granting Defendants' motion to dismiss and dismissing Plaintiffs' complaint. Thereafter an appeal was perfected to the Court of Appeals for the Fifth Circuit.

On November 8, 1974, the Court of Appeals in a *per curiam* opinion reversed the district court's decision, in light of its earlier decisions in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), and *Wyatt v. Aderholt* (Pet. App. 19a). Thereafter Petitioners filed their petition for certiorari in this Court to review the decision of the Court of Appeals.

REASONS WHY WRIT SHOULD BE DENIED

I. There Is No Suggestion, and Indeed No Indication, That the Prerequisites of Rule 19 are Satisfied by This Case.

Rule 19 provides that this Court may review by certiorari, decisions of lower courts in cases where there is a conflict in decisions of circuit courts of appeal and/or when a substantial or important, federal question is presented. The relevant portions of the rule provide that certiorari may be granted: "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court." Rule 19(b) *Supreme Court Rules* (1970).

A. Decisions by other courts—no conflict among the circuits.

In the instant case there is no conflict between decisions of courts of appeal. This case presents, on the present state of

the record, the bare question of whether persons involuntarily, civilly committed to state mental institutions are constitutionally entitled to adequate treatment. The Court is not called upon to decide the scope of relief which a district court could appropriately grant to a class of patients who seek to enforce and protect their "right to treatment." Turning as it does on complex factual questions, the "remedies question" of "right to treatment" cases would best be decided within the context of cases (e.g., *Wyatt v. Aderholt, supra*) where factual support for the remedies granted exists. Accordingly, this case concentrates on the narrow "right to treatment" issue.

There is unanimity among both state and federal courts that persons involuntarily committed to state mental institutions have a constitutional right to treatment. See, e.g., *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), and 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974); *Walsh v. Likins*, 373 F.Supp. 487 (D. Minn. 1974); *Davis v. Watkins*, No. C73205 slip op. at 12 (N.D. Ohio, Sept. 1974); *In Re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973); *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 161, 305 N.E. 2d 903 (1973).

There also exists wide precedent holding that there is a right to treatment for persons committed for care and treatment under "non-penal" statutes. See, eg., *Nelson v. Heyne*, 355 F.Supp. 451, 459 (N.D. Ind. 1972), *aff'd* 491 F.2d 352, 360 (7th Cir. 1974), *cert. denied* — U.S. — (1974), with regard to "juvenile delinquents"; *Martarella v. Kelly*, 349 F.Supp. 575, 585, 598-600 (S.D. N.Y. 1972), *enforced* 359 F.Supp. 478 (S.D. N.Y. 1973), with regard to "persons in need of supervision"; *Davy v. Sullivan*, 354 F.Supp. 1320, 1328-1329 (M.D. Ala. 1973) (three judge court), with regard to "sexual psychopaths"; and, *United States v. Walker*, 335 F.Supp. 705, 708 (N.D. Cal. 1971), with regard to "persons incompetent to stand trial."

The "right to treatment" has been expressly rejected by only one court, the district court in the instant case. *Burnham v. Dept. of Pub. Health*, 349 F.Supp. 1335 (N.D. Ga. 1972), *reversed and remanded*, 503 F.2d 1319 (5th Cir. 1974). Petitioners cite *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), as a rejection of the "right to treatment." (Petition pp. 17-18, n. 11.) Actually the district court in *Rockefeller, supra*, struggled for a definition of a "right" viewed by that court as very broad. The court settled on the phrase, "the right to be free from harm"; the court, having defined the "right" then granted sweeping relief akin to that granted in *Wyatt v. Stickney*, 344 F.Supp. 387, 390 (M.D. Ala. 1972). Accordingly, the *Rockefeller* decision is important more for the remedy granted than for the conceptual route by which the result was reached. Moreover, Respondents are advised that the district court in *Rockefeller* has reserved decision on the "right to treatment" issue pending the presentation of additional evidence and briefs. *Rockefeller, supra*, No. 72-Civ. 356, 357, Order of May 23, 1974, at 2.

Petitioners cite other decisions to indicate rejection of the "right to treatment." Petition, pp. 17-20, citing *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); and *People of New York ex rel. Anonymous v. LaBurt*, 218 N.Y.S. 738 (1961), *cert. denied* 369 U.S. 428 (1962). Both *Covington, supra* and *Lake, supra*, may not be read as rejections of the constitutional "right to treatment." *Covington* followed the lead of *Rouse* that the denial of treatment in public mental institutions raised constitutional questions. *Id.* at 625. *Rouse, supra*, was decided on statutory grounds but by way of dictum intimated that a constitutional basis for "the right" existed and thus became the judicial progenitor of "the right to treatment" litigation. To the extent that *Lake, Covington* and *Rouse* created uncertainties with respect to the District of Columbia Court of Appeals' position on this

issue, all doubt has now been resolved in favor of "the right." *In Re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973). *LaBurt, supra*, was decided without a hearing nearly 15 years ago.

That a right to treatment exists for state-confined mental patients has been supported by legal commentators.[2] professional organizations[3] and the United States government.[4]

While the State of Georgia may not be "an ogre" (Petition p. 8), it is certainly out of step with the prevailing case law and commentaries in its efforts to gain reversal of the Court of

---

[2] More than 30 law review articles, supporting the right to treatment have been published. Representative articles are: Birnbaum, "The Right to Treatment," 46 A.B.A.J. 499 (1960); Comment, "Development in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. 1190 (1974); Robitscher, "Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient," 18 Vill. L. Rev. 11 (1972); Note, "The Nascent Right to Treatment," 53 Va. L. Rev. 1134 (1967). Drake, "Enforcing the Right to Treatment," 10 Am. Crim. L. Rev. 587 (1972).

[3] *Amici curiae* briefs supporting the right to treatment have been filed with this Court in *Donaldson v. O'Connor, supra*, by the American Psychological Association, the American Psychiatric Association, the American Orthopsychiatric Association and the National Association for Mental Health. Petitioner cites an early position statement of the American Psychiatric Association critical of the right to treatment. Petition, pp. 33-34, N. 16 citing "Position Statement on the Question of Adequacy of Treatment," 123 Am. Journ. Psychiatry, 1458 (1967). The position of the A.P.A. has changed so as to provide "explicit support" for the right. See, American Psychiatric Association Task Force on the Right to Treatment, Draft Position Paper on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded (4th Draft, Oct. 1974).

[4] The United States has participated at all levels as *Amicus curiae* in *Wyatt v. Stickney, supra*. Additionally the United States Justice Department has participated either as a party or *amicus curiae* in other cases seeking to establish and enforce the right to treatment as a right of constitutional dimension. See, *United States v. Soloman*, civ. act. No. 74-181 (D. Md. filed Feb. 21, 1974); *New York Ass'n for Retarded Children v. Rockefeller, supra*. Finally Respondents are advised that the United States Solicitor General has written to this Court indicating support for "the right" in connection with this Court's review of *Donaldson v. O'Connor, supra*.

Appeals for the Fifth Circuit. Indeed the State of Alabama has not appealed the decision rendered in *Wyatt v. Aderholt, supra.*

B. **The substantial or important federal question.**

Any argument concerning the existence of a constitutional right to treatment unquestionably presents a substantial, important federal question. However, the subtle underpinnings of the constitutional issues demand a full, factual record to define the parameters of the right. In *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), this court held that the due process clause of the Fourteenth Amendment requires that the "nature" of confinement bear a reasonable relation to the "purpose" for confinement. The "nature" of Georgia's mental patients' confinement can only be described through the development and presentation of evidence at the trial court level. There is no factual record in this case since it was decided at the district court level solely on the pleadings.

The two principal appellate decisions supporting the right to treatment, *Donaldson v. O'Connor, supra* and *Wyatt v. Aderholt, supra,* contain voluminous factual records. *Donaldson,* now pending before this Court, contained jury findings of fact, arrived at at the conclusion of extensive testimony before the trial court. *Wyatt,* filed as a class action seeking institution-wide relief, contains thousands of pages of testimony and exhibits.

The instant case is more akin to *Wyatt* than *Donaldson* in that it was filed as a class action seeking injunctive relief for the class confined throughout Georgia's mental health facilities. In order for this court to reach the question posed by Petitioners, a thorough factual record would first have to be developed. The need for such a record can be seen in the very arguments presented herein by Petitioners.

1. For example, Petitioners argue that mere custodial care for some mental patients is constitutionally justifiable (Petition, 20) and that "curative" treatment[5] is not required. It is reasonable to expect that had this case been "tried" before the district court a factual record on that issue would have been developed to show: (A) the number of patients for whom treatment would be totally unsuccessful; (B) the quality of custodial care then provided by the State of Georgia as opposed to that minimally required to maintain a safe and humane environment; (C) the degree to which "hopeless" patients can benefit from active treatment.

2. In like fashion Petitioners argue that a court may not prescribe "a particular dosage of curative treatment." (Petition, 23). Respondents made clear in their complaint that the district court would not be called upon to order a specific treatment plan for each Georgia patient. Rather, the complaint sought class-wide relief to establish minimum standards so that every patient in each institution *could* be treated, regardless of his or her particular needs. The necessity of institution-wide standards, as well as their actual development, depend solely on testimony and other evidence adduced in a judicial proceeding.

3. Additionally Petitioners maintain that the "adequacy" of treatment is not a justiciable issue (Petition, 31-39). Basically Petitioners argue that courts are incapable of defining "treatment" in an enforceable, meaningful fashion. We should note that minimal standards to ensure the delivery of treatment were comprehensively defined by the district court in *Wyatt v. Stickney*. The existence of those standards, as both a procedural and substantive model, refutes Petitioners' contention. But again the

---

[5] Of course Respondents do not equate "treatment" with "cure." The goal of treatment programs for the mentally ill is not "cure" them but rather, as the Court of Appeals noted, is to "help each of them to be cured or to improve his or her mental condition." *Wyatt v. Aderhold, supra,* (Pet. App. 32a).

point to be made at this step in the proceedings is that the issue of justiciability cannot be decided in the abstract. Respondents, had the opportunity been provided, could have presented expert witnesses, who, having evaluated the Georgia mental health system, could have given their opinions as to the institution-wide "standards" necessary to insure the delivery of treatment, by whatever mode of therapy.

Petitioners build their argument around abstract quotations, taken out of context, that are meaningless when viewed alone.[6] It is true that dozens of treatment "modalities" or "therapies" exist. Respondents' contention in this litigation is that minimum standards must be established by Petitioners in order to deliver any treatment to Georgia's mental patients. The development of standards to ensure adequate care for Georgia's mentally ill, would not in any way infringe upon the medical judgment of Georgia's professional, mental health staff. The range of treatment alternatives would still be available. The district court would be asked simply to develop minimal standards as to the staff and facilities necessary to provide any type of treatment.

Whether or not Georgia is meeting those minimum standards is not known from the present record. That question can only be answered at the district court level after findings of fact have been made.

4. Petitioners argue that the 11th Amendment prohibits the relief sought by Respondents in the district court. (Petition, pp. 26-30). At the outset it should be noted that no relief has been granted against the State of Georgia, so the argument is at best premature. Further, Petitioners' reliance on the argument shows the need for a factual record. Having no facts to argue Petition-

---

[6] The quotation from Dr. Thomas Szasz, Petition at pp. 34-35, for example must be tempered by the understanding of Szasz' basic belief that mental hospitals and treatment for the mentally ill are virtually unnecessary since mental illness is a "normal" condition. See, Szasz, *The Manufacture of Madness* (Harper & Row 1970).

errs in jumping into the Court of Appeals decision in *Wyatt v. Aderholt* and note that Alabama's Governor maintained that implementation of the Wyatt decree would consume 60% of the state's general fund.[7]

It is unlikely that the cost of any court-ordered plan for Georgia's mentally ill would be a defense in light of the Court of Appeals decision in *Wyatt* where it was noted in specific reference to the district court opinion in *Burnham*: "Our holding in *Donaldson*, however, vitiates this argument, of course, for we have now established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment." (Pet. App. 36a). Thus, assuming the correctness of the Court of Appeals' view, the 11th Amendment argument is not a proper defense. However, the question of the appropriateness and permissibility of any remedy would depend upon the facts, in that the facts, as yet undeveloped, would determine the remedy granted by the district court.

Finally, with respect to the "substantial federal question" issue, we should point out that if certiorari is denied in this case, the improtant federal question may never be reached. Respondents, after having had the opportunity to utilize the discovery devices available through the *Federal Rules of Civil Procedure* may well alter the scope of this litigation. Further, Petitioners in their Petition note the existence of a "state" right to treatment. [Petition, p. 9, citing *Ga. Code Ann.* § 88-502.3(a)] If indeed Georgia confers the "right" by statute, Respondents could, upon return to the district court, elect to amend their complaint

---

[7] The allegation was unsupported by the record in *Wyatt* and was presented for the first time in brief to the Court of Appeals. To the extent that the *Wyatt* record focused on the question of costs, testimony indicated that implementation of the court-ordered standards would be less costly than the existing system since the court-required discharge and/or transfer of persons inappropriately housed in the Alabama mental institutions, would (and in fact has) radically reduce the institution population.

so as to allege the pendent claim to a right to treatment under the Georgia statute. The case could then be decided on the State claim alone. See, *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

II. The Court of Appeals Was Correct in Reversing the District Court in Light of the Court of Appeals Decision in Donaldson v. O'Connor and Wyatt v. Aderholt.

Upon appeal to the Court of Appeals for the Fifth Circuit the instant case (*Burnham*) was consolidated for purposes of argument and decision with the case of *Wyatt v. Aderholt*. *Burnham* was reversed in a *per curiam* opinion in light of the court's earlier decision in *Donaldson v. O'Connor, supra,* and the contemporaneous opinion in *Wyatt v. Aderholt*.

In seeking to evaluate the correctness of the *Burnham* decision one must necessarily look to the controlling opinions in *Donaldson* and *Wyatt*.

In *Donaldson* the plaintiff filed an action pursuant to 42 U.S.C. § 1983 against two doctors, seeking monetary damages for his claim that during his 14½ year incarceration in a Florida, state-run mental institution he had been unconstitutionally denied treatment. The jury returned a verdict in plaintiff's behalf for a total of $38,500.00. The Fifth Circuit affirmed, holding "that the Fourteenth Amendment guarantees involuntarily civilly committed mental patients a right to treatment." *Donaldson v. O'Connor*, 493 F.2d 507, 510 (5th Cir. 1974), *cert. granted* — U.S. —, 42 L.Ed.2d 138 (October 21, 1974).

The basis of the court's decision is best stated in that court's own language:

> The idea of a constitutional right to treatment has received an unusual amount of scholarly discussion and

> support, and there is now an enormous range of precedent relevant to, although not squarely in point with, the issue. The idea has been current at least since 1960, since the publication in the May 1960 issue of the American Bar Association Journal of Articles by Dr. Marton Birnbaun, a forensic medical doctor now generally credited with being the father of the idea of a right to treatment.
>
> *Donaldson v. O'Connor, supra,* at 520 (citations and footnotes omitted).

With that conceptual introduction the court announced its holding. In explaining its holding the court noted the following factors: (1) civil commitment entails "massive curtailment of liberty," citing *Humphrey v. Cady,* 405 U.S. 504 (1972); (2) governmental abridgement of any freedom must be justified in terms of some "permissible governmental goal," citing Tribe, "Foreword—Toward a Model of Roles in Due Process of Life and Law," 86 *Harv. L. Rev.* 1, 17 (1973); (3) where the rationale for commitment is the *parens patriae* notion that the person committed is in "need of treatment" due process requires that the treatment be in fact provided, citing *Wyatt v. Stickney,* 325 F.Supp. 785 (M.D. Ala. 1971); *Nason v. Supt., Bridgewater Hosp.,* 353 Mass. 604, 233 N.E. 2d 908 (1968), and *Jackson v. Indiana,* 406 U.S. 715 (1972); and (4) where the limitations on the goverment's power to detain (i.e., that detention be in retribution for a specific act, that it be limited to a specific term and that it be imposed after a constitutional proceeding) are absent, there must be a *quid pro quo* extended by the government (i.e., treatment) to justify the detention, citing 5 "lines" of cases omitted here.

Analyzed in the above manner the 5th Circuit's opinion in *Donaldson* is not merely correct, it is to be commended as a model of judicial reasoning and analysis. It should be noted that the *Donaldson* opinion goes on to answer virtually every

point raised here by Petitioners (e.g. justiciability is discussed at 493 F.2d 526).

Finally, with respect to *Donaldson* this court is aware that the case is pending here and awaits decision. If the issue of the right to treatment is reached in *Donaldson* it will of course control the outcome of *Burnham*. Since *Donaldson* is pending here, the Court may elect to defer decision on the instant petition, await its decision in *Donaldson* and then summarily dispose of *Burnham* on the basis of the decision in *Donaldson*. If the Court does not reach the "right to treatment" issue in *Donaldson* then the petition for certiorari in *Burnham* can still be acted upon.

Since it was a "companion" case to *Burnham*, the Court of Appeals decision in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), is of great significance. In *Wyatt* the Court of Appeals observed that the State of Alabama's major contention (i.e., that the right to treatment was not cognizable under the *United States Constitution*) was "largely foreclosed" by its decision in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974). In reference to *Donaldson* the Court stated:

> We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty.

The Court then dealt with each argument presented by Alabama in *Wyatt*. Briefly those arguments are listed below:

1. The State of Alabama argued that the principal justification for commitment of the mentally ill is to relieve the families and friends of the mentally disabled persons from the burden

imposed upon them to care for the persons. The State further argued that, in responding to the "families and friends" needs all the State had to do was provide custodial care for the affected mental patient. The Court of Appeals rejected the argument noting: (A) that the kind of care afforded by Alabama was grossly inadequate and in fact debilitating and (B) that the State's interest as stated was "trivial" when compared to the massive curtailment of the personal liberties of mental patients. *Id.* at 1313.

2. The State of Alabama argued that the relief granted by the district court was barred by the 11th Amendment. The Court of Appeals found the argument inapt since the right protected was one arising under the United States Constitution. *Id.* at 1314.

3. As does Georgia in the instant case, Alabama argued that the right to treatment is not a justiciable issue. The Fifth Circuit reaffirmed its belief, announced in *Donaldson*, that courts "would be able to formulate workable standards" in right to treatment cases. *Id.* at 1314.

4. Alabama argued that the district court opinion in *Wyatt* invaded the province of the state legislature's right to appropriate state funds. Noting that, "That being the case, the State may not fail to provide treatment for budgetary reasons alone," the Court of Appeals rejected the contention. *Id.* at 1315.

5. Finally Alabama suggested that mental patients had adequate remedies at law and that equitable relief was unnecessary. The Court of Appeals found the argument unpersuasive, primarily because the plaintiff-class had sought "preventive relief." Actions such as ***habeas corpus*** and suits for damages could only be brought after treatment had been denied, thus making class-wide injunctive relief appropriate. *Id.* at 1316.

The arguments above are set out at some length because the State of Alabama in *Wyatt* "tracked" the district court opinion in *Burnham*. Additionally many of the contentions in *Wyatt* are made here by the State of Georgia.

CONCLUSION

Since no conflict among circuit courts of appeals exists and since the decision sought to be reviewed was correct the Court should deny certiorari.

Submitted by

RUSSELL J. DRAKE
DRAKE and KNOWLES
P. O. Box DK
University, Alabama 35486

GEORGE W. DEAN, JR.
P. O. Box 248
Destin, Florida

Attorneys for Respondents